IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/08/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.653 of 2001

Chithayan .. Appellant

-Vs-

The State
rep. by Inspector of Police
N.I.B,
C.I.D. Salem. .. Respondent

This criminal appeal is preferred under Sec.374 of The Code of Criminal Procedure against the judgment of the Special Judge (E.C. Act), Salem made in C.C.No.56/2000 and dated 27.6.2000.

!For Appellant : Mr.N.Anand Venkatesh

^For Respondent : Mr.V.Jaya Prakash Narayanan
Government Advocate (Crl. Side)

:JUDGMENT

The sole accused in a case, wherein he stood charged, tried and found guilty under Sec.8(c) read with 22 of the N.D.P.S. Act and sentenced to undergo 10 years R.I. along with a fine of Rs.1,00,000/- and in default of payment of fine to undergo 2 years R.I. has brought forth this appeal.

2. The short facts necessary for the disposal of this appeal are as follows:

P.W.1 Veerannan, Sub Inspector of Police, attached to N.I.B. C.I.D., Salem on 16.12.1999 at about 9.00 A.M. along with P.W.4 Vellingiri, Head Constable No.910 and other police party on secret information were patrolling at Pethanayakkampalayam Bus Stop and entertained suspicion on the appellant/accused, who stood near the bus stop with a yellow colour bag on his right hand, at about 12.00 noon. P.W.1 after introducing himself, conveyed to him that he is entitled for the conduct of the search before a gazetted Officer or a Judicial Magistrate. The accused gave consent to be searched by the official himself. Accordingly, P.W.1 searched his bag in the presence of the two independent witnesses namely P.W.2 Duraisamy, Village Administrative Assistant and P.W.3 Duraisamy, Assistant and P.W.4 Head Constable and found 2 kilograms of Diazepam. P.W.1 seized the same under Ex.P2 mahazar in the presence of the said witnesses. He took two samples each 25 grams marked as M.O.2 and affixed the seal and the rest of the contraband was sealed, which is

marked as M.O.1. The appellant/accused was arrested under Ex.P3 arrest memo, a copy of which was served on him. The accused was brought to the Office, and a case was registered in Crime No.91/99 under Sec.20(b)(1) of the N.D.P.S. Act. Ex.P4 printed F.I.R. was prepared. The accused was taken to the concerned Court along with the F.I.R. and the material objects. They were all produced before the Court. A detailed report under Ex.P5 under Sec.57 of the NDPS Act was prepared and sent to the higher officials. P.W.6 Sankarapandian, Inspector of Police, NIB CID, Salem took up further investigation after obtaining Ex.P5 and other relevant records from P.W.1. He proceeded to the site of occurrence and also to the house of the accused, made a search in front of the witnesses, prepared Ex.P7 search memo, examined P.Ws.1 to 4 and recorded their statements. P.W.6 Investigating Officer made a request under Ex.P8 to the Court for sending M.O.2 for chemical analysis. Accordingly the sample was analysed by P.W.5 Arulanandam, Scientific Assistant attached to the Forensic Laboratory and found that the sample under M.O.2 is diazepam. P.W.5 sent Ex.P6 report to the Court. On 19.1.2002 P.W.6 examined P.W.5 and recorded his statement. On completion of the investigation, P.W.6 filed a charge sheet against the accused under Sec.22 of the N.D.P.S. Act.

3. In order to prove the charge levelled against the appellant/ accused, the prosecution examined 6 witnesses and marked 8 exhibits and 3 material objects. On completion of the prosecution evidence, the appellant/accused was questioned under Sec.313 of Cr.P.C. as to the incriminating materials found in the evidence of the prosecution witnesses, and the accused flatly denied the same as false. On the side of the defence, the wife of the appellant/accused namely Palaniammal was examined as D.W.1. No documents or material objects were marked on the side of the defence. On consideration of the rival submissions and scrutiny of the materials available, the trial Court has found the appellant/accused guilty under Sec.8(c) read with 22 of the NDPS Act and sentenced him to undergo imprisonment as stated supra. Aggrieved appellant/accused has brought forth this appeal.

4. Advancing his arguments on behalf of the appellant, the learned Counsel Mr.N.Anand Venkatesh interalia raised the following points for consideration by this Court:

No case was made out against the appellant/accused as regards the charge levelled against him. The prosecution relied on the evidence of P.Ws.1 to 4. P.Ws.2 and 3 are independent witnesses. They have turned hostile, and thus, the evidence of those witnesses were not available for the prosecution. P.W.4 was a constable attached to the Department. Therefore, he has spoken in his evidence in favour of the prosecution. The mandatory provisions under Ss 42(2) and 50 of the N. D.P.S. Act has not been strictly complied with by the investigating agency. Though, this was brought to the notice of the trial Court, they were not taken into consideration by that Court. Admittedly, P.W.1 received an information, when he was in the Office on the morning of that day. Though the said information was reduced to writing, it was not sent to the higher official, which would be violative of Sec.42 (2) of the Act. The said provision would mandate that on reducing the information, the same must be passed on to the higher-ups. But, in this case, it was also not complied with. Apart from that, according to Sec.50 of the Act, P.W.1 has not informed to the appellant/ accused that he was having a right to be searched before a Judicial Magistrate or a gazetted Officer. Ex.P1 was a statement of

the accused. A reading of the same would clearly indicate that Sec.50 of the Act was not complied with strictly. Under such circumstances, there was non-compliance of the mandatory provisions, which would be fatal to the prosecution case. Hence, the lower Court should have rejected the case of the prosecution. Therefore, the appellant/accused is entitled for an acquittal in the hands of this Court. In support of his contention, the learned Counsel relied on the decisions reported in 1994-1 -L.W.(Crl.) 292 (STATE OF PUNJAB V. BALBIR SINGH) and 2002-2-L.W.(Crl.) 854 (BECKODAN ABDUL RAHIMAN V. STATE OF KERALA).

5. In answer to the above contentions, with vigour and vehemence, the learned Government Advocate Mr.V.Jaya Prakash Narayanan would submit that the appeal carries no merits; that it is true that the prosecution examined P.Ws.1 to 4; that it is also true that P.Ws.2 and 3 have turned hostile, but it has no way affected the prosecution case; that P.Ws.1 and 4 have given cogent evidence, and the same was accepted by the trial Court; that it is a case where the search was made in a public place and the information was to that effect only, and hence, Sec.42(2) of the NDPS Act has no application to the present facts of the case; that apart from that, there was no search of the person, but a search of the bag was held, and hence, the provisions of Sec.50 of the Act is also not applicable to the present facts of the case; that in view of the above, the contentions of the appellant's side do not merit acceptance, and hence, only on consideration of the evidence available the lower Court has found the appellant guilty, and the appeal has got to be dismissed.

6. This Court paid its full attention on the rival submissions made and made a close scrutiny of the available materials, which lead to the irresistible conclusion that there is no substance in this appeal.

7. The gist of the prosecution as above was that on receipt of an information on 16.12.1999 P.W.1 along with his party including P.W.4 proceeded to Pethanayakkampalayam Bus Stop; that they entertained suspicion; that P.W.1 questioned the appellant/accused and informed his right to be searched; that he made a search in the presence of P.W.2 Village Administrative Officer and P.W.3 Thalayari and P.W.4 a Head Constable attached to the Wing and found that the yellow colour bag which was held by the accused contained 2 kilograms of diazepam; that the contraband was seized under Ex.P2 mahazar; that samples were taken; that the accused was taken to the Office; that a case was registered; and that the officials produced the accused before the concerned Court along with all the material objects. The learned Counsel for the appellant with vigour and vehemence, as recorded above, brought to the notice of the Court that in the instant case, both the independent witnesses P.Ws.2 and 3 have turned hostile. But, the Court is unable to see any merit in this contention. It is true that P.Ws.2 and 3 have turned hostile. The prosecution has also not relied on those evidence, which came out of the hostility. But, the prosecution has relied on the evidence of P.Ws.1 and 4. P.W.1's evidence was fully corroborated by the evidence of P.W.4. Rule of law does not say that the evidence of a Constable has got to be rejected and to be disbelieved. If it is a better piece of corroboration to the other part of the evidence adduced by the prosecution, the Court can well rely on the same. P.W.1's evidence as to the procedural formalities that were followed by him at the time of search and seizure corroborates the evidence of P.W.4. Hence, nothing can be suspected in the evidence of P.Ws.1 and 4 in that regard.

8. Coming to the question whether it is a fit case, where the officials were to follow the mandatory provisions under Ss 42 and 50 of the N.D.P.S. Act, the Court has to answer in the negative. It is true that an information was received by P.W.1, and the same was also reduced to writing. But, the said information was not sent to the higher-ups and not placed before the trial Court. In the instant case, P.W.1 has received an information that the search was to be made in a public place and not in a building as contemplated under Sec.42 of the Act. Under such circumstances, what is to be applied in the case on hand is only Sec.43 of the N.D.P.S. Act and not Sec.42. Hence, the decision of the Apex Court relied on by the prosecution and reported in 1999 (6) SCC 172 (STATE OF PUNJAB VS. BALDEV SINGH) is squarely applicable to the present facts of the case. The Court is of the view that since only Sec.43 of the NDPS Act is applicable, no question of non-compliance of Sec.42(2) of the Act would arise. Equally so is the contention put forth by the appellant's side that there was noncompliance of Sec.50 of the N.D.P.S. Act. In the instant case, a search was made not of the person of the appellant/accused, but of the handbag what he was held that time. It is well settled by the Apex Court in such circumstances that Sec.50 has no application at all. Hence, both the contentions put forth by the appellant's side do not carry merit. The lower Court was perfectly correct in finding the appellant/accused guilty under Sec.8(c) read with 22 of the N.D.P.S. Act. The Court is unable to notice any illegality or infirmity in the conviction recorded by the Court below.

9. Coming to the question of punishment, the lower Court has sentenced the appellant/accused to undergo 10 years R.I. and to pay a fine of Rs.1,00,000/-, in default to undergo 2 years R.I. The Court is of the considered view that there is nothing to interfere in the substantive sentence and also the fine. However, the interest of justice would be met by reducing the default sentence of 2 years R.I. to 3 months R.I.

10. In the result, the default sentence of 2 years R.I. imposed by the lower Court on the appellant/accused alone is modified, and in default of payment of fine of Rs.1,00,000/ awarded by the lower Court, the appellant/accused shall undergo 3 months R.I. In other respects, the judgment of the lower Court is confirmed. With this modification, this criminal appeal is dismissed.

Index: Yes
Internet: Yes

To:

1) The Special Judge (E.C. Act), Salem.
2) The Principal Sessions Judge, Salem.
3) The Superintendent, Central Prison, Salem.
4) The Public Prosecutor, High Court, Madras.
5) Mr.V.Jaya Prakash Narayanan, Government Advocate (Crl. Side), High Court, Madras.
6) The D.I.G. of Police, Chennai 4.
7) The Inspector of Police, NIB CID, Salem.

nsv/